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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID PETERSON, Defendant and Appellant.	B217407 (Los Angeles County Super. Ct. No. GA071758)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Reversed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Sharlene A. Honnaka, for Plaintiff and Respondent.

Defendant David Peterson appeals from his conviction for residential burglary. He contends the trial court erred in excluding evidence that he suffered from a diagnosed mental disorder. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358), the evidence established that on September 12, 2007, B.L. was one of five people renting the bottom floor of a house in Pasadena located next door to a Masonic Temple. At about 9:30 a.m. that day, B.L. was alone in her room when she heard someone in the house. Looking out the window, B.L. saw that none of her housemate's cars was parked outside, thus leading her to conclude none of them was in the house. When she heard footsteps near the door to her room, B.L. opened the door and saw a man holding a laptop bag; the man's hand was outstretched as though he had been about to open B.L.'s door. The man said he did not steal anything and asked B.L. not to call the police. B.L. asked what he was doing there; the man responded, "I don't know." After the man asked for permission to leave and B.L. said yes, he went out through the door to the patio. B.L. thought her roommates might have left the door unlocked that morning. B.L. found nothing in the house broken or missing. B.L. later found a model car had been moved from the basement to a table in the living room. Defendant's thumb print was found on the model car.

On October 22, 2007, B.L. positively identified defendant as the intruder from photographs shown to her by the police (although she could not identify defendant in court). B.L. did not know defendant and did not give him permission to be in the house.

Defendant was arrested in mid-December 2007. In January 2008, the trial court appointed Dr. Sanjay Sahgal to conduct a psychological examination of defendant to address the following three questions under Penal Code section 1368 (competency to stand trial): (1) does defendant have a mental disorder; (2) is defendant currently competent to stand trial; and (3) what psychiatric treatment, if any, is recommended? In

a report dated February 7, 2008, Dr. Sahgal concluded that defendant (1) suffered from "a psychotic disorder that likely represents schizophrenia;" (2) had disorganized thoughts and delusions that impaired him from cooperating with counsel in a rational manner; and (3) would benefit from antipsychotic medication. As an example of defendant's disorganized thoughts, Dr. Sahgal related that defendant said "he is a student of the Freemasons and is interested in 'getting in touch with different consciences.' He could elaborate upon these sorts of beliefs. He often smiled for no apparent reason and stated that he only wants to live in a dormitory near the 'Masonic Clinic.' " Dr. Sahgal expressly rejected the idea that defendant was feigning mental illness, observing: "If anything, [defendant] appeared to be downplaying the extent of his mental health problems." Dr. Sahgal believed that, "[w]ith consistent and thoughtful treatment, the defendant has a good chance of being restored to a state of mental competency in the near future." Dr. Sahgal suggested that defendant be treated with Risperdal and, because defendant did not have the capacity to make his own decisions about such medication, that he be treated in a hospital environment, such as Patton State Hospital. Defendant arrived at Patton State Hospital in May 2008.

Criminal proceedings resumed in September 2008.[1] Following a preliminary hearing on January 26, 2009, an information was filed on February 10, 2009, charging defendant with residential burglary. (Pen. Code, § 459.)

On May 29, 2009, defendant filed a written motion in limine seeking a ruling allowing admission of evidence that on February 6, 2008, Dr. Sahgal conducted a court-ordered psychological evaluation of defendant in which he found defendant "was incompetent at that time, and suffered from disorganized thoughts and delusions.

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[1] The record on appeal does not include any orders relating to defendant's competence or incompetence to stand trial. (Pen. Code, § 1368.) But at defendant's preliminary hearing in January 2009, defense counsel asked the trial court to take judicial notice of the fact that defendant "has been 1368 for nearly a year." Later, in the context of determining defendant's presentence custody credits, defense counsel stated that defendant arrived at Patton in May 2008 and that criminal proceedings resumed in September 2008.

Defendant stated that he wanted to live in a dormitory near the Masonic Clinic." A copy of Dr. Sahgal's February 2008 report was attached to the motion. Defendant argued that it was reasonably probable that this evidence would persuade "a jury that defendant did not enter the residence, next to the Masonic Temple, with the specific intent to commit theft or another felony."

At the Evidence Code section 402 hearing on June 1, 2009, defense counsel argued that Dr. Sahgal's testimony was relevant because defendant made statements to Dr. Sahgal about a Masonic Temple and the incident occurred in a residence next door to a Masonic Temple. "[DEFENSE COUNSEL]: So, based on that, I would argue that it can reasonably be inferred that the delusional ideas that were present at the time of the exam were likely to have been present at the time of the incident. [¶] THE COURT: Well, did Dr. Sahgal say that?" [¶] [DEFENSE COUNSEL]: I don't believe he can offer an opinion as to what [defendant] was specifically thinking, but I believe he can offer an opinion at what his mental issues [were]. [¶] THE COURT: . . . While the doctor could not offer testimony concerning whether [defendant] possessed the specific intent, he could offer testimony concerning whether [the defendant] was suffering from a mental disease or defect at the time of the commission of the offense. That's not what I have here. [¶] What I have here is a statement from the doctor that . . . [defendant] did not demonstrate any of the classical signs of mental illness typically seen in the forensic population and that he didn't endorse any atypical symptoms and he didn't appear to be drawing attention to claimed deficits. [¶] So Dr. Sahgal's opinion about competence was based in large part upon his belief that based upon the things [defendant] was saying at the time of the evaluation, he did not think the [defendant] could assist his counsel. It doesn't discuss anything beyond that. [¶] So I'm not presented with anything that gives me the authority to [admit Dr. Sahgal's testimony] because I don't have any expert opinion suggesting that [defendant] was suffering from that kind of mental disorder in 2007. [¶] Now, if you had that, I could discuss it further, but so far you haven't presented me with any, other than your belief that if he was saying these things at some

point in time it evidenced some confusion on something in September." Defense counsel responded that he had a November 2006 psychological evaluation of defendant which established that defendant was showing symptoms of mental illness then.[2] Defense counsel explained that he had not sought to admit the earlier report as evidence because he believed the trial court would find it too remote to be probative of defendant's mental condition at the time of the incident.[3] Although Dr. Sahgal had not seen the 2006 evaluation, defense counsel argued that the doctor could opine that defendant was suffering from a mental disease or defect in September 2007 based on the fact that he was diagnosed as such in November 2006 and again in February 2008.

The trial court concluded: "I am ruling at this time based upon the information that's been provided to me concerning the possible – concerning the defendant's mental state as evaluated by Dr. Sahgal in February of 2008, that that is not relevant to the issue of the defendant's – the existence of a mental disease, defect or disorder in September of 2007. [¶] If something else is presented to me, I'm perfectly willing to consider that

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[2] According to the November 2006 evaluation, which was attached as an exhibit to defendant's motion for new trial, defendant's mother brought defendant into the psychiatric emergency room at Arrowhead Regional Medical Center because defendant had for several months been acting "extremely bizarre." Defendant appeared "irritable, very paranoid, talking to himself, and confused. Thought process is very circumstantial and tangential with poor content. The patient report[s] multiple paranoid and persecutory delusions as well as very bizarre delusions. . . . He seems to have very poor insight and judgment." But he was cooperative and pleasant, and amenable to being admitted for "full investigation for what seems to be the first psychotic break . . . ."

[3] See e.g. *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 802 (*Albertson*), in which our Supreme Court observed that evaluations performed at the initial commitment stage under the Sexually Violent Predators Act (SVPA) "would not reflect the [petitioner's] current medical condition' at a subsequent stage, well more than a year later."

time and also will consider at that time the stage of the case that we're at and the impact it may have on the stage of the case that we're at."[4]

According to defendant's subsequent motion for new trial, defense counsel faxed Dr. Sahgal the 2006 psychological evaluation that day and Dr. Sahgal stated that he could testify that defendant suffers from a mental illness in the form of psychotic delusions that had already manifested themselves in November 2006 and that defendant's explanation for entering the residence – to obtain information about the Freemasons – was consistent with the delusions defendant exhibited in February 2008. Defense counsel did not revisit the issue with the trial court until the new trial motion.

Meanwhile, defendant testified at trial that he entered the residence because he erroneously believed it was affiliated with the Masonic Temple next door and he was looking for information about joining the Masons. After no one responded to his knock, defendant entered through an unlocked door. He went into the basement thinking it was the library. Upon realizing that it was not, defendant brought the model car upstairs to explain his mistake. He did not take anything or intend to take anything.

The focus of defense counsel's closing argument was that the People did not prove defendant entered the residence with the requisite intent to steal. Defense counsel acknowledged that defendant's stated reason for entering the residence did not make objective sense, but argued that it was clear from defendant's demeanor and testimony that he lived in his own world, which did not always coincide with the real world. Defendant's entry into the residence was "simply a mistake made by somebody who maybe isn't able to perceive things as clearly as the rest of us."

The jury found defendant guilty of residential burglary and found true the allegation that a person was present. The trial court denied defendant's new trial motion,

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[4] We note that the People did not file written opposition to the motion; at the hearing the prosecutor argued only that the evidence was inadmissible evidence of diminished capacity under Penal Code section 25, subdivision (a); the People made no hearsay or Evidence Code section 352 objection.

which challenged the exclusion from evidence of Dr. Sahgal's testimony. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant's sole contention is that the trial court erred in precluding Dr. Sahgal from testifying about his February 2008 diagnosis of defendant's mental illness. He argues that, in doing so, the trial court precluded defendant from presenting his defense that, as a result of a mental disorder, he did not have the requisite intent to commit a theft or any other felony when he entered the residence. We agree.

A. Defendant Did Not Forfeit the Claim of Error

At the outset, we dispose of an argument that respondent briefly makes: defendant has forfeited his claim of error. It is true that in some instances the failure to renew a motion may constitute a waiver of an issue on appeal. (See *People v. Davenport* (1995) 11 Cal.4th 1171, 1195.) Here, respondent argues, the trial court offered defendant the opportunity to renew the motion if counsel had additional information in support of the admissibility of evidence of defendant's mental state. Defendant failed to do so until his motion for new trial, and by then, says respondent, it was too late.

We agree that defendant has forfeited his argument that the trial court erred in denying a new trial based on defendant's belated theory that his counsel later showed the 2006 report to Dr. Sahgal who stated he could testify about defendant's mental state on the date of the break-in. Defendant had the opportunity to confer with Dr. Sahgal and ask the court to revisit the issue before trial ended and failed to do so.

But the failure to grant a new trial is only part of defendant's claim of error and, in fairness, is not defendant's principal argument. As stated on page 8 of defendant's opening brief, "The Trial Court Abused its Discretion when it Denied Trial Counsel's Motion to Admit Evidence of Appellant's Mental Illness, thereby Violating his Right to Due Process under the Fourteenth Amendment." Prior to trial, defendant filed a written

motion to admit the evidence in question, the trial court heard oral argument on the motion including a sufficient offer of proof, and denied the motion. Defendant was not required to make any further offer of proof or otherwise object to preserve that issue on appeal.

We now turn to whether the court's ruling before trial was in error and if so whether it was prejudicial.

B. The Proffered Evidence Was Relevant to the Specific Intent Element of Burglary

1. Trial Court Proceedings and Standard of Review

The standard of review for a claim of erroneous exclusion of admissible evidence is abuse of discretion. (*People v. Dean* (2009) 174 Cal.App.4th 186. " 'As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The court's ruling will be upset only if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.' [Citation.]" (*Id.* at p. 193.)

Here the record suggests that the trial court excluded the evidence because it concluded the proffered testimony was not relevant. We say "suggest" because the prosecution did not formally object to the evidence on relevancy grounds. On May 29, 2008, defense counsel filed a two page motion to admit evidence of defendant's mental disease. Dr. Sahgal's report was attached. The motion argued that the evidence was admissible under Penal Code section 28, which permits evidence of a mental disease to show "the accused actually formed a required specific intent . . . ." (Pen. Code, § 28, subd. (a).) The prosecution filed no opposition points and authorities. The case was called for trial on June 1, 2008. Before the jury was impaneled, the court took up the defense motion. Although the prosecution had not formally objected to the admission of evidence on Defendant's mental state, the court expressed its concerns about the relevancy of Dr. Sahgal's testimony, specifically on the materiality of reports in 2006 and 2008 in determining a mental state for a 2007 burglary. In his remarks to the trial court, the prosecutor agreed "with the court's opinion," and then discussed why the proffered

testimony was inadmissible "capacity to form a mental state" evidence, a point the trial court rejected. On appeal, the parties argue as if the evidentiary ruling was based on relevancy.

2. Analysis

Only relevant evidence is admissible. (Evid. Code, § 350.) When a specific intent crime is charged, evidence that the accused suffers from a mental disease, defect, or disorder is admissible on the issue of whether or not the accused actually formed the required specific intent. (Pen. Code, § 28, subd. (a).) But experts may not state an opinion on the ultimate question of whether the defendant had or did not have the required mental states. (Pen. Code, § 29.) In *People v. Vieira* (2005) 35 Cal.4th 264, 292 (*Vieira*), our Supreme Court explained: " 'Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state. [Citations.]" It is irrelevant whether the expert believes the defendant had or did not have the requisite mental state. (*People v. Coddington* (2000) 23 Cal.4th 529, 582 (*Coddington*), overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13, and partially superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1107, fn. 4.)

In *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364, the court examined the "dividing line between permissible opinion testimony concerning mental state and impermissible testimony concerning whether the defendant did or did not have the required mental state." It concluded that Penal Code sections 28 and 29 "allow the presentation of detailed expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted." (*Id*. at p. 1365.) Thus, for example, an expert can testify that the accused tends to overreact to stress and apprehension as a

result of a history of psychological trauma, that such condition could result in the accused acting impulsively under certain particular circumstances, and that the encounter at issue is the type that could result in an impulsive reaction from one with the accused's mental condition. But an expert cannot testify that the accused in fact acted impulsively on the occasion in question. (*Ibid*.)

Neither party has cited, nor has our independent research found, any case that specifically addresses the issue of whether a psychiatric evaluation is too remote in time from the incident to be relevant to the specific intent element of the charged offense. The answer may be in the nature of the testimony. To some extent it is within the province of the expert to say whether or not an evaluation is germane to events occurring several months earlier. We also find *People v. Jablonski* (2006) 37 Cal.4th 774 (*Jablonski*) instructive. The defendant in *Jablonski* was charged with two first-degree murders, including one occurring during the commission of rape and sodomy. The defendant objected to several items of evidence on grounds that the evidence was more prejudicial than probative. First, in the context of a competency trial, he objected to admission of a tape recording he made two years before the proceeding in which he described the murders in graphic detail. (*Id*. at p. 504.) The defendant acknowledged the tape's relevancy to the extent it established his ability to recall and communicate (see, *People v. Samuel* (1981) 29 Cal.3d 489, 504 [confession obtained one year before competency proceeding had some probative value in determining present competency]) but argued it was unduly prejudicial. (*Jablonski*, at p. 806.) The court concluded that the evidence was not more prejudicial than probative. (*Ibid*.) Second, in the context of the guilt phase, the defendant objected to admission of a letter he wrote to the murder and sexual assault victim nine years before the murder. (*Id*. at p. 824.) The court found the letter, in which the defendant expressed his prurient interest in the victim, was relevant to the truth of the rape and sodomy charges notwithstanding the nine year time lag, because the defendant would have been unable to act on his desires any sooner because he was in prison. (*Id*. at p. 824.) *Jablonski* suggests that evidence of the defendant's mental state two years and

nine years prior to a murder can be relevant to a defendant's mental state at the time of the murder.

Also instructive are cases decided under the SVPA. (Welf. & Inst. Code, § 6600 et seq.) A person cannot be committed under the SVPA "absent relevant evidence of a *currently* diagnosed mental disorder that makes the person a danger to the health and safety of others . . . ." (Welf. & Inst. Code, § 6600, subd. (a)(3), italics added.) And persons committed under the SVPA "shall have a current examination of his or her mental condition made at least once every year." (Welf. & Inst. Code, § 6605, subd. (a).) In *Albertson, supra,* 25 Cal.4th at page 802, the court observed that the petitioner's current mental condition would not be reflected in a psychiatric report prepared "well more than a year" before. By implication, an evaluation under the SVPA may be considered "current" if it was conducted within a year of the SVPA trial.

Here, the People had to prove that defendant entered the residence with the "intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) The theory of defense was that, from the evidence that defendant was diagnosed with a mental disorder in November 2006 and again in February 2008, it was reasonable to infer that he had a mental disorder in September 2007; one manifestation of defendant's mental disorder, as defendant explained to Dr. Sahgal, was a fascination with the Freemasons. Apparently consistent with this fascination, defendant entered the residence seeking information about the Freemasons because he believed that the residence was affiliated with the Masonic Temple located next door. The trial court did not question the general relevance of mental disorder evidence to the intent element of burglary. Rather, it found that Dr. Sahgal's testimony was irrelevant because he did not state in his February 2008 written report that defendant suffered from a mental disorder at the time of the incident in September 2007. In coming to this conclusion, the trial court appears to have rejected defense counsel's offer of proof that there was a November 2006 psychiatric evaluation and that defense counsel expected Dr. Sahgal to testify that, in his opinion, defendant suffered from a mental disorder in September 2007 based on the November 2006 and

February 2008 diagnosis. This evidence may not have persuaded a jury that defendant's obsession with Freemasons or his 2008 mental illness prevented him from having the specific intent to steal but it was relevant to that issue.[5]

In light of the critical nature of the evidence to defendant's only defense, trial court's earlier appointment of Dr. Sahgal to give his opinion on defendant's mental state, and the court's reliance upon that report in suspending proceedings for five months in 2008 while defendant was confined to Patton State Hospital, we conclude the trial court abused its discretion when it ruled evidence from Dr. Sahgal was inadmissible. Although the trial court might have understandably believed that different evidence might have been stronger, that assessment did not rule out the jury giving appropriate weight to evidence based on reports from before and after the 2007 break-in.

C. Exclusion of the Evidence Was Not Harmless

Where the trial court excludes some but not all evidence relevant to a defense, the *Watson* standard of review applies, not the more stringent *Chapman* standard.[6] (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, the People argue any error was harmless because "it is not reasonably probable there would have been any different result if the court had allowed [the evidence], given defendant's multiple entries into the basement and living quarters of the residence; the sounds Ms. B.L. heard of him rummaging around before she found him outside her door about to open it; the consciousness of guilt he expressed by immediately denying that he stole anything and asking her not to call the police; his taking of the

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[5] Even defendant's statement to Dr. Sahgal that he was a student of Freemasons – not objected to as hearsay (see Evid. Code, § 1250) – was relevant to explain defendant's unusual defense that he had inadvertently wandered into B.L.'s residence.

[6] *People v. Watson* (1956) 46 Cal.2d 818, 835-836; *Chapman v. California* (1967) 386 U.S. 18, 24.

model car from the basement; and the doctor's opinion that although appellant's mental illness had manifested itself as of November 2006, it was of the kind that 'waxes and wanes.' "

The People's argument misses the point. Dr. Sahgal's testimony was intended to corroborate defendant's alternative explanation for all of the evidence the People relied upon to establish guilt. (See e.g. CALCRIM No. 226 [in evaluating credibility, jurors may consider the reasonableness of the testimony in light of all other evidence in the case].) Absent evidence from Dr. Sahgal, defendant's explanation for entering the residence was far-fetched, to say the least. But with it, the jury would have had a framework to judge the defense that it was defendant's mental illness and preoccupation with Freemasons, not an intent to steal, that was at the root of his odd meanderings on the day in question. It is reasonably probable that, if the jury had believed defendant had a mental disorder, it would have believed defendant acted for reasons a mentally healthy person would not share and that he did not enter the residence with the requisite specific intent.

DISPOSITION

The judgment is reversed.

RUBIN, ACTING P. J.

I CONCUR:

FLIER, J.

Grimes, J., Dissenting

I do not find the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) The trial court recognized that expert testimony was potentially admissible to negate the specific intent element of the burglary charge but correctly found the proffered testimony of Dr. Sahgal as reflected in his February 6, 2008, psychological evaluation was not relevant to defendant's mental state at the time of the crime five months earlier.

The trial court had appointed Dr. Sahgal in January 2008 to perform a psychological evaluation pursuant to Penal Code section 1368, to decide defendant's competency to stand trial. Dr. Sahgal's evaluation did not address the entirely different question of defendant's mental state at the time of the charged crime in September 2007. Dr. Sahgal stated in his report that he did not discuss the crime with defendant at all, and therefore, it did not appear he had any basis for opining on defendant's mental state at the time of the charged crime.

Mental competence to stand trial is not the same as mental illness negating the ability to form a specific criminal intent at the time of the charged crime. (*People v. Ramos* (2004) 34 Cal.4th 494, 508-509 [evidence of bizarre, paranoid behavior, strange words, preexisting psychiatric condition or psychiatric treatment has little bearing on the question whether the defendant is competent to stand trial].)

When defense counsel told the court he had an older report from "early '06" that might provide a basis for Dr. Sahgal to express an opinion as to defendant's mental state at the time of the crime, the trial court made it plain that it would reconsider the ruling if defendant offered such expert testimony. The trial court told defense counsel what to do if counsel could offer expert testimony as to defendant's mental state at the time of the

crime. The court told counsel he did not need to make another motion or provide a supplemental expert declaration; all he had to do was provide his own declaration describing what additional expert testimony the defense could offer.

Yet, defendant never made a further offer of proof until after the jury convicted defendant, even though the trial court clearly stated the ruling was without prejudice to a new request supported by additional information. We cannot review the correctness of the trial court's ruling by reference to the subsequent declaration of Dr. Sahgal presented *after* trial, because our review is limited to the ruling at the time it was made. (*People v. Welch* (1999) 20 Cal.4th 701, 739.)

Far from abusing its discretion, I find the trial court correctly excluded the irrelevant testimony as to defendant's competence to stand trial and left the door wide open for defendant to offer a relevant opinion as to his mental state at the time of the crime. That defendant chose not to walk through the open door until it was too late does not suggest the trial court should have done anything differently.

GRIMES, J.